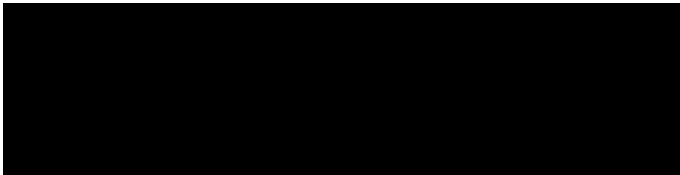




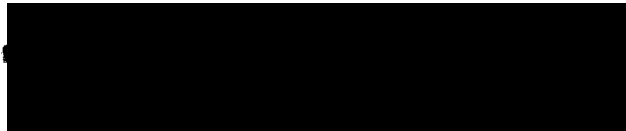
U.S. Citizenship
and Immigration
Services

B-6



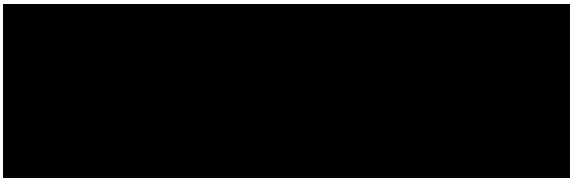
FILE: LIN 03 009 52565 Office: NEBRASKA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner:
Beneficiary:



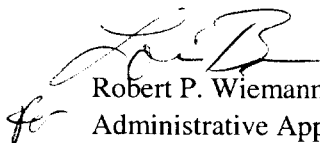
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

RECEIVED
JUL 14 2004
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
WASHINGTON, DC 20529

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape and stonework design company. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$36.47 per hour or \$75,857.60 per year.

With the petition, counsel submitted a copy of a profit and loss statement for the period January 1, 2002 through August 16, 2002 and a copy of the second page of the petitioning owner's 2001 form 1040, U.S. Individual Income Tax Return. The profit and loss statement showed a net income of \$21,938 and the second page of the form 1040 reflected an adjusted gross income of -\$7,793. The director considered this evidence insufficient, and, on October 29, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. The director specifically requested copies of the petitioner's most recent Form 941, Employer's Quarterly Federal Tax Form, a copy of the petitioner's State Unemployment Compensation Report Form, a copy of the beneficiary's form W-2, Wage and Tax Statement, and a copy of the beneficiary's most recent pay voucher.

In response, counsel submitted a copy of the petitioner's forms 941 for 2002, a copy of the petitioner's State Workers Compensation Assessment, a copy of the petitioner's quarterly wage and withholding supplement, a printout of information that would appear on the beneficiary's 2001 and 2002 form W-2, and a copy of the beneficiary's most recent pay voucher. In 2001, the beneficiary received a total of \$22,787 in wages, and as of December 18, 2002, he received \$21,889 in wages.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on April 3, 2003, denied the petition.

On appeal, counsel submits a copy of the petitioning owner's 2000 and 2001 Schedule C, Profit or Loss from Business, from the owner's form 1040, U.S. Individual Income Tax Return, a copy of a compilation report for the period ended March 31, 2003, and copies of contracts for work to be performed by the petitioner. Counsel states: "the determination of the Service was incorrect. Attached is evidence that establishes the petitioner's ability to pay the proffered wages."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001. The wages paid to the beneficiary were \$53,070.60 below the proffered wage in 2001 and \$53,968.60 below the proffered wage in 2002.

The 2000 Schedule C reflects a net profit of \$18,194. Because the priority date of the petition is April 30, 2001, the petitioner's 2000 tax return has no direct relevance to the petitioner's ability to pay the proffered wage and will not be considered as evidence of the petitioner's ability to pay the wage beginning on the priority date and continuing.

The 2001 Schedule C reflects a net profit of \$36,544 and the compilation report for the period ended March 31, 2003 reflects a net income of \$12,961.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. Although the petitioner's profit during 2001 was \$36,544, that profit plus the amount paid to the beneficiary in 2001 is still less than the proffered wage ($\$36,544 + \$22,787 = \$59,331$). The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. The petitioning owner's adjusted gross income for 2001 was -\$7,793. The petitioner could not pay the proffered wage of \$75,857.60 out of this income. Furthermore, it is noted that the petitioner has filed additional Forms I-140 for workers at the same or approximately the same wage, that fall within the same year as the above filing date for this petition. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the

time of filing of the petitions. No evidence was provided that the petitioner possessed other resources with which to pay the proffered wage.

The contracts in the record reflect services to be performed in the future. A petitioner must establish the elements for the approval of the petition at the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.